BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

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FEB 1 6 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

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Tele-Communications, Inc. hereby files its Reply Comments in the above-captioned proceeding.[1]

I. SUMMARY

Commenters in this proceeding express a variety of conflicting opinions on the Congressional intent underlying Section 628. Rather than attempting to arbitrate these opinions, TCI submits that the Commission should base its rules on the only truly reliable expression of Congressional intent available to it -- the language of the Act itself.

In addition, TCI offers the following responses to specific issues raised in the comments:

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[1] Notice of Proposed Rulemaking in MM Docket No. 92-265, FCC 92-543 (rel. Dec. 24, 1992) ("Notice").

- A violation of Section 628 requires a showing of significant harm to competition.

- Discounts based on the number of subscribers served by a distributor are permissible under Section 628.

- The Commission may not abrogate existing program distribution contracts.

- The Commission should adopt attribution rules that do not diminish program production.

- The Commission should not interpret the "undue influence" standard of Section 628 and the "conditioning" and "coercion" standards of Sections 616 to prohibit legitimate marketplace bargaining.

- The comments provide ample reason for the Commission to focus on removing barriers to cable operator entry into telephone companies' core business.

II. RESPONSE OF TCI TO SPECIFIC ISSUES RAISED BY COMMENTERS

Several commenters in this proceeding appear to view Section 628 as a surrogate for marketplace negotiations. They would have the Commission, through its rulemaking process, mandate a business relationship, and the terms and conditions of that relationship, between specific suppliers and distributors. They interpret Section 628 in a way that would validate virtually any complaint by a multichannel video distributor. Of course, they then urge the Commission to be the arbiter of the flood of such complaints that would predictably follow from such an extreme interpretation. In effect, these commenters ask the Commission to establish itself as a third-party to every program distribution contract in order to ensure that the government gives the commenters everything they cannot get through marketplace negotiations.

It is not surprising that to accomplish this goal, these commenters must torture, or completely ignore, the language of Section 628. TCI urges the Commission to reject such radical and self-interested interpretations of Section 628. The Commission should not focus on what a particular commenter believes Congress meant in Section 628. Rather, in adopting rules under Section 628, TCI believes the Commission should be guided by the most reliable source for determining what Congress intended -- <u>the language of the Act itself</u>.

A. <u>A Violation of Section 628 Requires a Showing of Significant Harm to Competition</u>

Perhaps the most critical task the Commission must accomplish in this rulemaking is to establish clearly the elements that must be proven to find a violation of Section 628. TCI submits that this question can be readily answered by reference to the explicit language of Section 628. That Section prohibits a vertically integrated satellite cable programmer from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[2]

The plain language of this Section requires that two elements must be proven before conduct falls within the

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[2] 47 U.S.C. Sec. 548(b).

prohibition of Section 628: 1) the conduct must constitute an "unfair" or "deceptive" method of competition; and 2) it must "hinder significantly" or "prevent" competition in the marketplace. It could not be clearer that Congress intended only to prohibit conduct demonstrated to have caused harm to competition.

Yet, a number of commenters assert that no showing of harm to competition is required to prove a violation of Section 628.[3] Such commenters understandably do not support this position with reference to the language of the Act. To the contrary, they disavow the language of Section 628. For example, the National Rural Telecommunications Cooperative ("NRTC") quotes Subsection (b) of the Act and then, in the sentence immediately following the quote, incredibly concludes that "[t]his is not what Congress intended, nor what the statute requires."[4] This is patently absurd. The language of Subsection (b) may not be precisely what NRTC wanted, but it is precisely what Congress intended.[5]

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[3] See, e.g., Comments of United States Satellite Broadcasting Company, Inc. ("USSB"), Competitive Cable Association ("CCA"), National Rural Telecommunications Cooperative and the Consumer Federation of America ("NRTC"), and the Coalition of Concerned Wireless Cable Operators ("Coalition").

[4] Comments of NRTC at 12-13.

[5] NRTC criticizes the Commission because it "seems to believe ... that discrimination should be prohibited in a particular case only if it amounts to" and then NRTC quotes Subsection (b). Comments of NRTC at 12. But this is precisely what the Commission should believe because it is precisely what the Act says.

TCI's position that harm to competition is an essential element of Section 628 is not only compelled by the explicit language of the Act, it is mandated by common sense. Clearly, Congress did not go through the trouble of enacting a prohibition on conduct that did not cause harm. The Commission must not accept so futile an interpretation of Section 628.

Nor can the Commission find that either discrimination or harm to competition separately constitute a violation under Section 628. Such an interpretation is invalid based on the explicit language of Section 628(b), which prohibits "unfair methods of competition or unfair or deceptive acts or practices, <u>the purpose or effect of which</u> is to hinder significantly or to prevent" a multichannel video distributor from providing programming to consumers. Section 628(b) simply is not written in the alternative. To the contrary, the harm to competition contained in the second part of Section 628(b) qualifies the "unfair methods of competition" or "unfair or deceptive acts or practices" in the first part of that Section. This Subsection does not say that discrimination <u>or</u> harm to competition constitute a violation. It says that discrimination "<u>the purpose or effect of which</u>" is to harm competition constitutes a violation. Some parties in this proceeding might wish that harm to competition were not required to sustain an allegation that Section 628 has been violated, but that is not consistent with the law Congress passed. The law Congress passed very clearly makes harm to competition a material element of any complaint under Section 628. Again, TCI urges the Commission to focus on the language of the Act, not a potential complainant's self-interested wish list.

Moreover, as TCI demonstrated in its initial comments, the harm that is prohibited under Section 628 is harm to competition in the marketplace, not to a particular competitor. This is a fundamental precept of competitive marketplace analysis. In their Comments, the Attorneys General of Texas, Maryland, Ohio and Pennsylvania ("Attorneys General") ignore this analysis and conclude that "[t]he harm, then, is not measured by the injury to competition, rather it is measured by the injury to any distributor."[6] The Attorneys General overlook the fact that the language of Section 628(b) -- "unfair methods of competition" and "deceptive acts or practices" -- tracks Section 5 of the Federal Trade Commission Act.[7] In recent years, Section 5 has been interpreted to prohibit only conduct having substantial anticompetitive effects on the marketplace, not conduct that merely injures a competitor.[8]

This interpretation makes sense because it is well-established that certain arrangements that may harm a competitor can nonetheless benefit consumers. In an article in the Yale Law Journal, Thomas G. Krattenmaker and Steven C. Salop demonstrated

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[6] Comments of the Attorneys General at 5.

[7] 15 U.S.C. Sec. 45.

[8] See, e.g., General Motors Corp., 103 F.T.C. 641, 701 (1984); Boise Cascade Corp. v. FTC, 637 F.2d 573, 579 (9th Cir. 1980).

that an exclusionary practice which may harm a competitor can, at the same time, have a very substantial beneficial impact on competition and consumers:[9]

> Measured by the consumer welfare standard, exclusionary rights may be completely innocuous, neither harming competition nor furthering it. In many cases, however, these rights will have discernible procompetitive or anticompetitive effects. Indeed, the same practice may generate both types of effects.
>
> Exclusionary rights may generate procompetitive benefits by reducing the parties' costs or creating a new product ... The purchasing firm may associate its product with that of the supplier, thereby easily and clearly identifying the joint product in consumers' minds or facilitating joint promotional campaigns. Exclusivity may reduce a manufacturer's costs of maintaining the reputation and quality of its product after title and control have passed to the purchaser or may prevent free-riding by competitors. Finally, the exclusionary right may be the unavoidable outgrowth of a productive joint venture, permitting the parties each to manufacture goods that are best marketed together.

This analysis is fully applicable to the cable industry. Consider the competitive dynamics when a particular distributor obtains an exclusive program distribution contract. By its terms, such a contract prohibits another distributor from offering the programming in the area for which exclusivity has been obtained. However, even if the other distributor could sustain a claim that it had been harmed (a proposition TCI believes is doubtful), it should not follow that a violation of

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[9] Thomas G. Krattenmaker and Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 209, 228-229 (1986) (citations omitted).

Section 628 has occurred. Product differentiation is a principal method of competing in the marketplace. Exclusivity is a common method of accomplishing differentiation and enhancing a distributor's ability to compete. Moreover, the other distributor in this example, faced with exclusivity, has a number of potential responses, each of which is pro-competitive. For example, because the distributor with exclusivity presumably paid for it, the other distributor has increased ability to compete on the basis of price. Also, the distributor may seek its own exclusive program arrangements, improving its competitive status and, incidentally, increasing the programmer's revenues and contributing to the development of program diversity. Likewise, the other distributor could create (or cause to be created) its own programming, again enhancing its competitive standing and directly advancing program diversity.

All of this increases competition. Thus, if the Commission focuses on harm to a particular competitor, rather than harm to competition, it may inadvertently lessen competition and reduce consumer welfare.

Therefore, the Commission must look beyond claims by competitors that they have been harmed by a particular practice and attempt to identify whether or not the practice improves marketplace efficiency and leads to benefits to consumers.

B. Discounts Based on the Number of Subscribers Served by a Distributor Are Permissible Under Section 628

In its initial comments, TCI demonstrated that volume discounts are permissible under Section 628. To support its view, TCI noted the following:

1) The clear language of Section 628(c)(2)(B)(iii) which permits price differentials resulting from "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."(emphasis added)

2) Recent findings by the Commission that volume discounts are "legitimate sales practices."[10]

3) An economic analysis prepared by Stanley M. Besen, Steven R. Brenner, and John R. Woodbury, entitled "Exclusivity and Differential Pricing for Cable Program Services" (submitted as an appendix to TCI's comments)("Besen Paper"), concluding (at p. 11) that "volume discounts will promote efficiency in the supply of programming. As a result, preventing such" volume discounts "runs a high risk of reducing efficiency and restricting the supply of programming."

4) The fact that volume discounts are a common business practice employed by sellers in many industries to induce buyers to purchase greater quantities.

A number of commenters in this proceeding endorsed TCI's position. For example, E! Entertainment Television, Inc. pointed out that:

> For an advertiser-supported network such as E!, the chief benefit attributable to the number of subscribers served by a distributor is audience exposure. E! achieves genuine economic benefit in the form of incremental advertising revenue when it adds a sufficient number of subscribers. Accordingly, E!

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[10] See Application of TEMPO Satellite, Inc., 7 FCC Rcd. 2728, 2732 (1992).

submits that a volume discount based on the size of the subscriber base, which is an important incentive to a programming service trying to achieve or maintain viability, is a completely legitimate form of price differential and should be recognized by the Commission as such.[11]

Numerous commenters agreed that volume discounts were a necessary and legitimate business practice and were permissible under Section 628.[12] The Attorneys General, for example, stated that "the volume of programming sold to different types of distributors may be relevant evidence in evaluating whether there has been discrimination."[13] Thus, the Attorneys General recognize that a claim of discrimination under Section 628 can be defeated by a demonstration that the price differential is a result of a volume discount. Such a position is, in effect, tacit agreement that volume discounts are exempt from Section 628 by the terms of Subsection (c)(2)(B)(iii).

There is very little suggestion in the comments that volume discounts are unlawful under Section 628. To the extent that some commenters can be understood to oppose such discounts unless they are justified by actual cost differentials,[14] such an interpretation is clearly inappropriate. First, Subsection

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[11] Comments of E! Entertainment Television at 9-10.

[12] See Comments of Discovery Communications, Inc., Landmark Communications, Inc.("Landmark"), and Time Warner Entertainment Company, L.P. ("Time Warner").

[13] Comments of the Attorneys General at 10.

[14] See Comments of the Coalition and the Attorneys General.

(c)(2)(B)(iii), by its terms, does not require any cost justification. In fact, that subsection lists "cost savings" as one potential reason for a discount based on the number of subscribers served by a distributor, but cites additional broad reasons, such as "economies of scale" or "other direct and legitimate benefits." Congress would not have specifically listed other justifications for volume discounts if its intent was to require a cost-based justification.

Second, to read Subsection (c)(2)(B)(iii) as requiring a cost-based justification for volume discounts would be superfluous because price differentials justified by actual cost differences are already permitted under Subsection (c)(2)(B)(ii).[15]

C. The Commission May Not Abrogate Existing Program Distribution Contracts

A number of commenters urged the Commission to apply Section 628 retroactively and, in certain circumstances, to abrogate existing distribution contracts.[16] These commenters, however, do little more than state their wish that Section 628 be applied retroactively. The comments either contain no analysis or the analysis is obviously and badly flawed.

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[15] See Comments of Time Warner at 27.

[16] See Comments of USSB; The NYNEX Telephone Companies; The Wireless Cable Association International, Inc.; and NRTC.

The United States Satellite Broadcasting Company, Inc. ("USSB"), for example, simply states that "[i]t would be reasonable" to apply Section 628 retroactively.[17] This is hardly persuasive evidence that the Act mandates retroactivity. The NYNEX Telephone Companies ("NYNEX") admit that Section 628 is silent on the issue of retroactivity, but mistakenly conclude that such silence "means that the rules are to be enforced" retroactively and that "if Congress had intended to grandfather all existing arrangements between programmers and cable operators, Congress would have so stated."[18]

NYNEX and, in fact, all the other commenters that advocate retroactivity, completely ignore Supreme Court precedent that compels precisely the opposite result. It is well-established that, while Congress has the power to retroactively impair private contracts through legislation, retroactivity shall not be presumed unless the legislation specifically "requires this result."[19] In Bowen v. Georgetown University Hospital, the Supreme Court clearly states that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive

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[17] Comments of USSB at 4.

[18] Comments of NYNEX at 12.

[19] Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

rules unless that power is conveyed by Congress in express terms."[20]

Several commenters assert that, because Section 628(h) exempts certain exclusive contracts entered into on or before June 1, 1990, all other contracts necessarily are not grandfathered.[21] However, such an interpretation is no more consistent with the Supreme Court precedent cited above than complete retroactive application of Section 628 to all existing contracts. In effect, these commenters argue that because Congress considered and rejected retroactivity in one specific, narrow situation, the Commission should presume that Congress intended retroactivity in all other situations. But this is just what the Supreme Court has said may not be done. Administrative agencies may not presume retroactivity. Instead, they may apply a statute retroactively only if Congress explicitly required retroactive application. Thus, notwithstanding Subsection 628(h), the general rule against retroactivity must be fully applicable to all other program distribution contracts.

Common sense further dictates such a result. Even a modest understanding of the complexities of the program distribution business should lead one to the view that retroactive application of Section 628 and abrogation of existing contracts would have a

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[20] Id. (emphasis added.)

[21] See Comments of NRTC, NYNEX, and WCA.

chaotic impact on the marketplace.[22] Retroactivity would cause extraordinary uncertainty and necessitate significant diversion of resources, as companies scramble to renegotiate literally thousands of contracts. Programmers, distributors and, ultimately, consumers will be harmed. And, it must be remembered that these contracts were perfectly lawful when entered into, further increasing the sense of unfairness that necessarily attaches to retroactive application of a statute to private contracts.

It is for these reasons that the Supreme Court has so clearly established a presumption against retroactivity. Likewise, it is for these reasons that the Commission must reject retroactive application of Section 628.

D. The Commission Should Adopt Attribution Rules that Do Not Diminish Program Production

A number of commenters urge the Commission to adopt a very low attribution threshold for purposes of determining whether a programmer is vertically integrated within the meaning of Section 628.[23] Such a proposal is, in effect, an effort to limit vertical integration by creating a strong disincentive for cable operators to continue to invest in program production.

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[22] Many Commenters recognize the complex nature of the program distribution business. See, e.g., Comments of Time Warner, Landmark, Liberty Media Corporation, and the National Cable Television Association, Inc. ("NCTA").

[23] See, e.g., Comments of USSB, CCA, Attorneys General, and NRTC.

The Commission has repeatedly recognized that vertical integration significantly enhances consumer welfare by increasing the quality and diversity of programming.[24] Antitrust[25] and economic analysts[26] support the Commission's conclusion. Over the last decade, the cable industry has dramatically increased the diversity of programming available to consumers and vertical integration has been an important factor in making that possible.

To the extent Section 628 is interpreted to require a programmer which is vertically integrated with a cable operator to permit competitors of the cable operator to use its programming to compete with the cable operator, such cable operator obviously has reduced motivation to invest in the programmer. The competitor, in this instance, would be able to "free ride" on the cable operator's investment <u>for the purpose of competing against the cable operator</u>. As a general matter, this phenomenon will reduce incentives to vertical integration and, in turn, diminish program diversity. A very low attribution threshold would have the effect of diminishing program diversity

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[24] <u>See</u> <u>Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service</u>, 5 FCC Rcd 4962, 5008-5011 (1990); <u>see also</u> Federal Communications Commission Network Inquiry Special Staff, <u>Final Report New Television Networks: Entry, Jurisdiction, Ownership and Regulation</u> Vol. 1, 374-376 (1980).

[25] <u>See</u> Robert H. Bork, <u>The Antitrust Paradox</u> 225-238 (1978); <u>cf.</u> <u>Continental T.V., Inc. v. GTE Sylvania Inc.</u> 433 U.S. 36, 54-58 (1977) (vertical restrictions can promote competition, for example, inducing retailers to invest necessary capital to properly distribute new products).

[26] <u>See</u> Besen Paper at 2.

further by creating disincentives against even minimal investments in programming.

Essentially, commenters urging such a construction of Section 628 want someone else to invest the capital and take the risk necessary to launch and maintain a program service. After the money has been spent, the risk averted, and the program service proven successful, these commenters show up and demand to share in the revenue stream. Frankly, TCI looks forward to the day when these commenters cease to rely upon the government to get what they want and begin to use their own capital and other resources in the marketplace to develop their own distinct programming for consumers.

The Commission also should recognize that investment by cable operators does not guarantee success in the marketplace. To the contrary, some program services in which MSOs have invested have failed, e.g., The Fashion Channel (in which TCI and United Cable Television, among others, invested) and Festival (owned by HBO and Time Warner). Yet none of the commenters urging the Commission to interpret Section 628 as imposing a strict duty to deal offer to share in the financial impact of such failures. Their goal is as self-serving as it is transparent -- to obtain, through manipulation of government processes, all the benefits of program production while taking none of the risks of such production.

TCI is, however, sensitive to the need for the Commission to establish reasonable attribution rules. TCI believes that any attribution rules should encourage investment in programming. In this regard, any interest at or below 10% should be viewed as de minimis. The Commission has already recognized in its Attribution Rulemaking[27] that the current five percent broadcast attribution threshold is outdated. The Commission tentatively proposed a 10% trigger in order to facilitate broadcasters' ability to compete in today's capital markets. TCI supports raising the broadcast attribution rule. Given that the Commission has already recognized that these rules are outdated and impede access to capital, it would be arbitrary and capricious to insist on applying them here.

Likewise, any interests at or above 50% plainly provide de jure control to such interest holders. Under Commission precedent fully applicable here, such interests should be deemed controlling. See, e.g., Albert J. Feyl, 15 FCC 823 (1951). Thus, in any situation where there is a majority owner with interests of 50% or greater, by definition, no minority owner can have a controlling interest. Therefore, such minority ownership interests should not be attributable for purposes of calculating the Commission's ownership rules.

This analysis is, of course, fully consistent with the Commission's "single majority shareholder" concept. The Commission has previously recognized that minority shareholders in a company which has a single majority shareholder have vastly

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[27] Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, 7 FCC Rcd 2654 (1992).

diminished governance opportunities. See, e.g., Attribution of Ownership Interests, 97 FCC 2d 997, 1008 (1984). In such instances, "the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of the licensee...." Id. at 1008-09. TCI believes the "single majority shareholder" concept should be incorporated into the Commission's rules adopted in this proceeding.

The Commission's treatment of partnerships should also apply here. Thus, under current rules, general partnership interests can be assumed to control their partnerships regardless of actual equity levels. Limited partners which meet the insulation criteria should be discounted entirely. These rules may change as a result of the attribution rulemaking, and any such changes should be applied here as well.

E. The Commission Should Interpret the "Undue Influence" Standard of Section 628 and the "Conditioning" and "Coercion" Standards of Section 616 to Allow Legitimate Marketplace Bargaining

As TCI pointed out in its Comments, the "undue influence" standard of Section 628(c)(2)(A) and the "conditioning" and "coercion" standards of Section 616(a)(1) and (2) are closely analogous to those established in antitrust cases dealing with tying arrangements and exclusive dealing contracts.[28] These cases hold that explicit proof of threats or intimidation are

[28] Comments of TCI at 33.

necessary to sustain an allegation of "conditioning" or "coercion."[29]

The cases also demonstrate that the mere fact of a financial interest or an exclusive arrangement should not, by itself, be sufficient to support an allegation of "conditioning," "coercion," or "undue influence" under Sections 616 or 628. The Supreme Court has recently reiterated the longstanding rule that an illegal tie -- which requires a showing that the sale of one product was "conditioned" on the purchase of another -- must involve more than the purchase of two products. Rather, there must be independent evidence of "forcing" or "coercion."[30] Thus, the mere fact that a carriage agreement is executed simultaneously with a financial interest or an exclusivity agreement, even if the two are in the same contract, should not establish a violation of Sections 616 or 628.

The Motion Picture Association of America, Inc. ("MPAA"), suggests that "[u]ndue focus on defining coercion in this proceeding is ... misplaced" and proposes that the Commission consider complaints on a case-by-case basis.[31] TCI supports this

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[29] See, e.g., Bob Maxfield, Inc. v. American Motors Corp., 637 F. 2d 1033, 1037-38 (5th Cir. 1981); Umphres v. Shell Oil Co., 512 F. 2d 420, 423 (5th Cir. 1975); Webb v. Primo's Inc., 706 F. Supp. 863, 867-68 (N.D. Ga. 1988); McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1246-47 (E.D. Mich. 1978).

[30] See Jefferson Parish Hospital v. Hyde, 466 U.S. 2 (1984); see also Capital Temporaries v. Olsten Corp., 506 F. 2d 658 (2d Cir. 1974).

[31] Comments of MPAA at 7.

position. However, MPAA also proposes that the Commission establish certain "indicators" of "coercion" and "undue influence."[32] While the notion of establishing indicators or factors that would be relevant in assessing complaints under Sections 616 and 628 could theoretically be useful, the indicators proposed by MPAA are inappropriate.

For example, MPAA's proposed indicators include the following: "[r]efusal to carry a service on terms and conditions equivalent to what is reasonable and standard in the industry for comparable programming," the fact that a distributor rejected carriage of a program service, but subsequently agreed to carriage after ownership or exclusivity was offered by the programmer, and "dominance in the market of the distributor obtaining exclusivity."[33] The problem with these indicators is they may have nothing to do with "coercion" or "undue influence." There are legitimate reasons why any of these situations could occur. A cable operator may desire different terms and conditions for comparable programming because the second service of the same type is not worth as much in terms of consumer demand. In addition, how will the Commission define comparability? An operator may reject carriage of a service, yet subsequently desire partial ownership or exclusivity because its competitive dynamics or its capital availability have altered. [redacted] way proves that the distributor exercised "coercion" or "undue influence" in a particular instance.

In addition, the Commission should adopt rules under Sections 616 and 628 that recognize that distributors and suppliers must be allowed to engage in tough, aggressive bargaining. Such negotiations ultimately produce an efficient supplier-distributor relationship to the great benefit of consumers. That is why the courts have so steadfastly required explicit proof of threats or intimidation to sustain an allegation of "coercion" or "undue influence." Any lesser standard would have the effect of chilling normal marketplace negotiations.

For these reasons, the Commission should adopt the MPAA's suggestion that complaints under Sections 616 and 628 should be addressed on a case-by-case basis, but reject MPAA's proposed specific factors.

F. The Comments Provide Ample Reason for the Commission To Focus on Removing Barriers to Cable Operator Entry Into Telephone Companies' Core Business

TCI notes that numerous telephone companies filed comments in this proceeding, generally advocating enlarged rights of access by distributors to satellite cable programming.[34] These

[34] See e.g., Comments of BellSouth Telecommunications, Inc.; NYNEX; The Ameritech Operating Companies; Joint Comments of Bell Atlantic and the Pacific Companies; Rochester Telephone Corporation; and the National Telephone Cooperative Association.

comments demonstrate the interest among telcos in entering the cable television business. Coupled with the recent announcement by U S West that it will aggressively pursue the delivery of broadband video through upgrades in its distribution plant,[35] and Southwestern Bell's announced purchase of the Montgomery County, Maryland, and Arlington County, Virginia, cable systems,[36] it is clear that the telcos have made and are executing a strategic decision to enter the cable television business.

In this regard, TCI reiterates its view that these developments clearly establish that there is sufficient flexibility <u>under current law</u> for telephone companies to participate in the cable television business. TCI believes that government regulators should now seriously focus their efforts on removing barriers to entry into the telephone companies' core businesses.

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[35] <u>See</u> <u>U S West to Roll Out VDT Network Regionwide Beginning in 1994</u>, Communications Daily, Feb. 5, 1993, at 1.

[36] Paul Farhi and Cindy Skrzycki, <u>Southwestern Bell to Buy Arlington, Montgomery Cable</u>, Wash. Post, Feb. 10, 1993, at C1.

III. CONCLUSION

For these reasons, TCI urges the Commission to adopt rules consistent with the proposals contained herein and in its initial comments in this proceeding.

Respectfully submitted,

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